

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A.  
DREW EDMONDSON, in his capacity as  
ATTORNEY GENERAL OF THE  
STATE OF OKLAHOMA AND  
OKLAHOMA SECRETARY OF THE  
ENVIRONMENT C. MILES TOLBERT,  
in his capacity as the TRUSTEE FOR  
NATURAL RESOURCES FOR THE  
STATE OF OKLAHOMA**

**PLAINTIFFS**

**v.**

**CASE NO.: 05-CV-00329 TCK –SAJ**

**TYSON FOODS, INC., TYSON  
POULTRY, INC., TYSON CHICKEN,  
INC., COBB-VANTRESS, INC.,  
AVIAGEN, INC., CAL-MAINE FOODS,  
INC., CAL-MAINE FARMS, INC.  
CARGILL, INC., CARGILL TURKEY  
PRODUCTION, LLC, GEORGE'S,  
INC., GEORGE'S FARMS, INC.,  
PETERSON FARMS, INC., SIMMONS  
FOODS, INC. and WILLOW BROOK  
FOODS, INC.**

**DEFENDANTS**

**DEFENDANTS' SCHEDULING PROPOSAL PURSUANT TO  
JANUARY 5, 2007 ORDER (DKT. NO. 1016)**

As instructed by the Court, counsel for Defendants met with counsel for Plaintiffs on January 12, 2007 and again on January 19, 2006 to “discuss scheduling dates” for this case. 1/5/07 Order and Opinion, p. 4 (Dkt. No. 1016). Unfortunately, those meetings did not yield an agreement between the parties as to the appropriate form or content of a scheduling or case management order for this case. Consequently, Defendants provide the Court with the following information and scheduling proposals for the Court’s consideration in developing a scheduling or case management order:

### **I. Defendants' Objections to the Plaintiffs' Scheduling Proposal**

Defendants object to the schedule and deadlines proposed by Plaintiffs as being unrealistic and prejudicial to defendants. The proposed November 2008 trial date might have been achievable had Plaintiffs forthrightly disclosed the basis for this lawsuit in their initial disclosures or even in response to written discovery. However, as this Court is well aware, Plaintiffs' sampling data, which is central to this case and which Plaintiffs' counsel has described as voluminous, has been withheld from Defendants for the over a year and one half. Under the Court's Order, Plaintiffs have been ordered to produce that information on February 1, 2007. 1/5/07 Order and Opinion, p. 11 (Dkt. 1016). Plaintiffs' obstinate refusal to disclose such basic information has severely retarded the development of the issues in this lawsuit. In addition to reviewing the long-withheld sampling data, Defendants require sufficient time between now and trial to depose potentially dozens of party and non-party fact and expert witnesses, review and analyze the State's "rolling production" of records from multiple state agencies<sup>1</sup>, conduct any sampling or field work necessary to respond to Plaintiffs' "sampling data", prepare expert reports, file dispositive motions, participate in what promises to be a hard-fought *Daubert* phase and prepare jury instructions, pre-trial briefs and motions in limine. Many of these initiatives will require hearings and conferences before the Court with attendant delays

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<sup>1</sup> Plaintiffs have substantially delayed Defendants in their efforts to obtain relevant records from State agencies. Document reviews and records custodian depositions have been repeatedly postponed. Plaintiffs have not yet even committed to dates for document reviews for the following four agencies: Oklahoma Department of Agriculture, Food & Forestry, Office of the Secretary of Environment, Department of Recreation and Tourism and Department of Wildlife Conservation. In addition, Defendants' copying of records from other agencies has been substantially delayed due to unreasonable restrictions imposed by Plaintiffs on the number of records that can be removed for copying at one time. As a result of Plaintiffs' conduct, Defendants are unlikely to have copies of all relevant agency documents until after July 2007.

arising from this Court's already crowded docket. Simply put, the work remaining in this case cannot be completed in time for Plaintiffs' proposed November 2008 trial date.

Defendants' objections to Plaintiffs' scheduling proposal are not limited to the proposed November 2008 trial date. Defendants also object to the manner in which Plaintiffs have sought to sequence or stage several of the pre-trial deadlines. For example, Plaintiffs ask this Court to stagger their own expert reporting deadlines with Plaintiffs' "Damages Reports" not being due until five (5) months after their "Injury and Causation Reports". This is improper. Plaintiffs' expert reports on all issues in this case should be submitted at the same time. Moreover, Defendants cannot submit their expert reports on damages simultaneous with Plaintiffs' experts as proposed under their schedule. Any opinions that Defendants offer on "damages" will likely be in rebuttal of Plaintiffs' expert opinions on this topic. Likewise, the proposed 60-day gap between submission of Plaintiffs' "Injury and Causation" expert reports and Defendants' expert reports is insufficient. Defendants will need considerably more than 60 days to analyze Plaintiffs' multiple expert reports and any previously undisclosed data or analysis supporting such reports, depose each expert and assimilate the information learned into detailed reports by defense experts. Defense counsel raised each of these objections with Plaintiffs counsel during the January 12<sup>th</sup> meeting, but Plaintiffs refused to reconsider their positions on the proposed deadlines.

## **II. Defendants' Scheduling Proposal**

At the January 12, 2007 meeting, Plaintiffs' counsel advised Defendants that after a year and one-half of litigation they have now decided to file a motion for a preliminary injunction which would be the subject of a two-week long evidentiary hearing. Plaintiffs

claim that the motion for preliminary injunction will be supported by expert opinions and scientific analysis; presumably analysis of the “voluminous” sampling data which Defendants will not receive until February 1, 2007. Plaintiffs made this disclosure because they believed the inclusion of a preliminary injunction phase in this case would alter Defendants’ views on realistic and achievable pre-trial deadlines. Plaintiffs are correct in that regard. Defendants believe that such a motion, if filed, will consume the parties’ and this Court’s resources and attention for an extended period of time while depositions of designated preliminary injunction experts are taken, defense expert rebuttal reports are prepared, briefs are written and witness and exhibit lists specific to a hearing on the motion are prepared and exchanged. Given the delay in progress of the case-in-chief, which Plaintiffs acknowledge will occur if a motion for preliminary injunction is filed, Defendants submit herewith two different scheduling proposals; one assuming a motion for preliminary injunction is not filed (Exhibit A) and one assuming a motion for preliminary injunction is filed (Exhibit B).

With respect to Defendants’ scheduling proposal for this case with a preliminary injunction motion phase (Exhibit B), Defendants request the opportunity to be heard again on the appropriate schedule for this case if and when such a motion is actually filed. Defense counsel inquired at the January 12, 2007 meeting as to the basis for the motion, the nature and geographic scope of relief to be sought and the anticipated filing date of such a motion. Plaintiffs flatly refused to provide such details. Plaintiffs’ refusal to provide such information greatly limits Defendants’ ability to make a meaningful scheduling proposal. At this time, Defendants believe the schedule outlined in Exhibit B would be reasonable for a case of this magnitude with a preliminary injunction motion

phase. However, this schedule may be too truncated or, for that matter, too elongated once Plaintiffs finally reveal the basis for their threatened motion and the nature and scope of injunctive relief sought.

### **III. Conclusion**

Defendants request that this Court reject Plaintiffs' scheduling proposal and enter a case management and scheduling order consistent with Defendants' scheduling proposals. More specifically, Defendants request that this Court adopt a schedule substantially similar to that proposed in Exhibit B unless Plaintiffs elect not to file a motion for preliminary injunction in which event Defendants request that this Court adopt a schedule substantially similar to that proposed in Exhibit A.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 21<sup>st</sup> day of January 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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